Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-879

THE STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

THE HONORABLE PETER J. BRENNAN,
Appellee.

On Appeal from the United States
District Court for the District of Columbia

JURISDICTIONAL STATEMENT OF APPELLANT STATE OF CALIFORNIA

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No. 74-879

THE STATE OF CALIFORNIA, ET AL.,
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v.

THE HONORABLE PETER J. BRENNAN,
Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT STATE OF CALIFORNIA

Appellant State of California appeals from the Judgment of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing with prejudice both the Complaint of the National League of Cities, et al., as amended, and the Complaint in Intervention of the State of California. This Statement is respectfully submitted by appellant State of California to demonstrate the Honorable Court's jurisdiction of the appeal, and the presence of a federal question of such substance and magnitude as to warrant its immediate consideration and disposition by the Court.

OPINION BELOW

The Per Curiam opinion of the United States District Court for the District of Columbia, dated December 31, 1974, is not yet reported and, for that reason, a true and correct copy thereof is appended hereto as "Exhibit A" of the Appendix.

JURISDICTION

The action below was brought pursuant to the provisions of 28 U.S.C. §§ 1331, 1337, 1346, 2201 and 2202, as well as the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States.

A three-judge district court was convened below pursuant to 28 U.S.C. § 2282. Appellant State of California filed a Notice of Appeal from the adverse Judgment of the court on January 8, 1975, a true copy of which is appended hereto as "Exhibit B" of the Appendix.

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §§ 1253 and 2101(b), providing for direct appeal to the United States Supreme Court from an order of a district court of three judges denying interlocutory or permanent injunctive relief in a civil action or proceeding properly brought under an Act of Congress regulating commerce (28 U.S.C. § 1337). The decisions of this Court sustaining jurisdiction, under facts similar to those presented here, are well established. *Maryland* v. *Wirtz,* 392 U.S. 183 (1968); *Carter* v. *Stanton,* 405 U.S. 669 (1972).

QUESTION PRESENTED

SHALL THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, BE APPLIED TO ALL EMPLOYEES OF STATE AND LOCAL GOVERNMENTS UNDER THE COMMERCE CLAUSE SO AS TO REGULATE INDISPENSABLE SOVEREIGN FUNCTIONS (SUCH AS FIRE SUPPRESSION AND LAW ENFORCEMENT) WHICH, UNLIKE THOSE PRESENTED IN MARYLAND v. *WIRTZ*, 392 U.S. 183 (1968), *ARE NOT IN COMPETITION WITH PRIVATE INDUSTRY AND HAVE NO RATIONAL CONNECTION WITH COMMERCE?*

STATUTES INVOLVED

The pertinent sections of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259; 88 Stats. 55)[1], the subject of the suit below, are set forth in full as "Exhibit C" of the Appendix herein.

STATEMENT OF THE CASE

By a Complaint for Declaratory Judgment, together with an Application for Preliminary Injunction, appellant National League of Cities, et al. filed this action in the United States District for the District of Columbia seeking injunctive and declaratory

[1] The sections referred to above amend or repeal various sections of the Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201-219). The principal amendments in issue are those which are part of Section 6 of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259) entitled "Federal and State Employees". The precise sections of Title 29, United States Code, affected by the Amendments are set forth in the Appendix, "Exhibit C".

relief against various provisions (see "Exhibit C" of Appendix) of the Fair Labor Standards Act Amendments of 1974 which, for the first time in the 36-year history of the Fair Labor Standards Act of 1938, sought to impose federal restrictions on the wages, hours, and working conditions of *all* Federal, State, and local government employees. A three-judge District Court was duly convened (28 U.S.C. § 2282) and the matter of the preliminary injunction was set for December 30, 1974.

By an Order dated December 26, 1974, the Court granted the Motion of Appellant State of California to intervene as a party plaintiff and to fully participate in the Application for Preliminary Injunction set for December 30, 1974. The Complaint in Intervention of appellant State of California was also filed and served on that date; the State's Application for Preliminary Injunction was filed on December 27, 1974.

Defendant Secretary of Labor, Peter J. Brennan, filed on December 27, 1974, a Motion to Dismiss the Complaint, and an Opposition to the Application for Preliminary Injunction. The Motion to Dismiss was also set to be heard contemporaneously with plaintiffs' Application for Preliminary Injunction.

On December 30, 1974, the Applications of plaintiffs and plaintiffs-intervenors for a Preliminary Injunction, as well as defendant's Motion to Dismiss, came on regularly for hearing before United States Circuit Judge Harold Leventhal and United States

District Judges Oliver Gasch and Barrington Parker. At that time, seventeen additional states were permitted to intervene as plaintiffs with the stipulation that, except as to plaintiff State of California, service of all pleadings on said intervening states would be effective by service on counsel for plaintiff National League of Cities, Mr. Charles Rhyne. Several depositions and affidavits were received into evidence and the matter was argued and submitted for decision.

On December 31, 1974, the three-judge District Court below, in a Per Curiam Opinion, denied the Applications for Preliminary Injunction and dismissed the Complaint, as amended,[2] and the Complaint in Intervention (See "Exhibit A" of Appendix).

Appellants National League of Cities, et al. (and the intervening states) filed their Notice of Appeal on December 31, 1974. The Notice of Appeal of appellant State of California was filed on January 8, 1975 (See "Exhibit B").

THE QUESTION BEFORE THE COURT IS SUBSTANTIAL.

1. *Background.* Since 1966, employees of State and local schools, colleges, hospitals, and other health care institutions have been subject to the wage-hour

[2] The Court's Opinion ("Exhibit A") was also addressed to an Amendment to paragraph 39 of the Complaint of plaintiff National League of Cities, which alleged a violation of the Fifth Amendment, United States Constitution, for the failure of defendants to give proper notice of its regulations (29 C.F.R. § 553, *et seq.*) prior to their effective date. The formal regulations pertaining to fire and police personnel were not published in the Federal Register until December 20, 1974, a mere eleven days before their date of implementation, January 1, 1975.

provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060; 29 U.S.C. § 201 *et seq.*), as amended. In *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), this Court held that such legislation could be supported as a scheme necessary to protect commerce and to promote labor peace; that labor conditions in schools and hospitals can affect commerce; and that Congress interfered with state functions only to the extent that it subjected the states to the same wage and overtime limitations as private employers who were engaged in *the same* economic activities.

On April 8, 1974, the President signed Amendments to the Act (Pub. L. 93-913; 88 Stats. 55), effective May 1, 1974, extending the minimum wage and overtime provisions of the Act to *all* Federal, State, and local government employees, except as to those employees who serve in "executive, administrative, or professional" capacities. Fire protection and law enforcement personnel (including correctional personnel) were provided an exemption under section 13(b)(20) of the Act (29 U.S.C. § 213(b)(20)) until January 1, 1975, at which time such personnel were required to be *paid* premium overtime for tours of duty in excess of 240 hours in a work period of 28 days (60 hours for 7 days, or in a ratio of 240/28 for work periods between 7 and 28 days). By the new Amendments, in January of the following two years (1976 and 1977), premium compensation will have to be *paid* for work performed in excess of 232 and 216 hours, respectively, including ratios for premium pay

for work performed beyond a 7-day work period. The new amendments do not require weekly or semi-monthly payments; however, minimum wage and overtime will be computed on the basis of hours worked each workweek.[3] Compensatory time off ("C.T.O.") taken in a later pay period does not meet the Act's new overtime provisions.

2. *Effect of the Subject Amendments on the State of California.* The Fair Labor Standards Act Amendments of 1974 will severely limit, if not altogether eliminate, the ability of the State of California to recognize the overtime hours of its employees in forms other than cash compensation. Numerous California statutes will be superseded and nullified by the federal amendments. For example, California Government Code sections 18021.5 and 18023 allow the California State Personnel Board to provide for *either* cash compensation or compensating time off ("C.T.O.") at 1½ times the regular rate of pay or hours worked; C.T.O. may be taken up to a period of *12 months* following the overtime worked. Under the federal amendments, C.T.O. *must* be taken in a *28-day* work period or such personnel must be *paid* premium overtime.

The federal statute, in one stroke, works to the disadvantage of employer and employee. The State's

[3] A "workweek" is a regular recurring period of 168 hours in the form of seven consecutive 24-hour periods. "Hours worked" includes all time an employee is required to be on duty or on the employer's premises, at a prescribed workplace, and all times during which the employee is suffered or permitted to work. 29 U.S.C. § 207.

extended fire season (of 5 to 8 months' duration) frequently requires a "campaign" fire suppression program to be waged in California's vast mountainous regions. Members of the fire suppression classes in state service receive an additional 15% "fire mission pay" and, by Government Code section 18021.7, may work *84 hours* per week (or *336 hours* per *calendar* month) before overtime rules apply. Earned C.T.O. may be taken in the inactive winter months by the employee to maintain a consistent payroll status, with its attendant benefits (such as retirement credits and the like). Yet, by the federal amendments, such employees are now restricted to *60 hours* per workweek (or *240 hours* per *28-day* work period) and are precluded from utilizing all C.T.O. which is not taken during a 28-day work period. The wishes of the employer, to maintain a reasonable cost of a crucial and indispensable function of State government, and the wishes of the employee, to provide a consistent or uniform payroll status with the State, are lost to the irrational whim of Congress.

These and other effects of the federal amendments were referred to by the lower court as follows (Slip Opinion, pages 5-6, fn. 3; see "Exhibit A"):

> "California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that coun-

ties will be unwilling to continue to cooperate in this venture.

"Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees."

The State of California, by its verified Complaint in Intervention below, alleged an estimated *8 to 16 million* dollars by reason of the extension of the Act to State government, as well as an *additional* estimated *6 million dollar* loss in the "Mutual Aid" fire program, *750,000 dollars* in California Highway Patrol Academy training, and an *inestimable* amount in meeting the record-keeping requirements of the federal Act. The National League of Cities has estimated the cost to States and Cities nationally to be approximately *200 million dollars.*[4]

[4] The Government in its Motion to Dismiss and Opposition to the Application for Preliminary Injunction alleged that the actual fiscal impact of the federal amendments on the Nation was but

3. *The Enormity of the Federal Question Before the Court.* Appellant State of California, 18 other States, and 15,000 Cities (also appellants), ask this Honorable Court to review and to reverse the attached Judgment of the three-judge District Court (Appendix, "Exhibit A") which held that by virtue of this Court's decision in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968), the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3) may be extended to permit the federal regulation of indispensable sovereign functions of State and local government (such as law enforcement and fire suppression) even though such functions are not in serious competition with private industry.

Application of the Fair Labor Standards Act of 1938 to *all* State and local employees constitutes an unprecedented interference by Congress with the rights and prerogatives of State and local government over the manner in which the wages, hours, compensable time, and other personnel matters are established and administered. The net effect is to confer upon Congress and federal administrative agencies outright control of local employees who occupy purely *governmental* positions—created by local government, paid with funds raised by local government, and performing indispensable services entirely intrastate in character.

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27 million dollars. The Government's figure is ludicrous, irrespective of the dollar accuracy of plaintiff's estimate. In any event, the constitutional question presented here—the unprecedented federal regulation of *all* State and local government employees—is of such gravity as to render such a statistical confrontation by the parties immaterial.

In *Coan* v. *State of California,* 11 Cal.3d 286, 520 P.2d 1003 (1974) the California Supreme Court found that Congress did not intend the Economic Stabilization Act of 1970 to apply to the States. Justice Mosk, taking "a firm constitutional stand for state independence in its governmental function", concurred with the majority "solely on the basis of the Tenth Amendment to the Constitution." Justice Mosk's reference to the pervasive impact of the Economic Stabilization Act on the States under the Commerce Clause is equally applicable here (at p. 1012 of 520 P.2d):

> "If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state."

The issue before the California Supreme Court in *Coan* is now before this Honorable Court in *Fry* v. *United States,* No. 73-822.[5] There, the Temporary Emergency Court of Appeals (*United States* v. *State of Ohio,* 487 F.2d 936 [T.E.C.A. 1973]) held that by virtue of *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), the Economic Stabilization Act of 1970 could be applied to the States by Congress under the Commerce Clause

[5] The State of California has filed a Brief as Amicus Curiae in Support of Petitioners in that case.

without doing violence to the sovereignty of the States guaranteed by the Tenth Amendment. Certiorari was granted and the matter has now been argued and submitted for decision. The opinion of the three-judge court in the instant case, extending this Court's language in *Wirtz* to yet another federal intrusion into the internal affairs of State government, is of no less magnitude.

In *Employees of the Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973), this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.,* 377 U.S. 184 [1964]) which upheld under the Commerce Clause federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[6] The Court refused to place the State in the position of a "proprietary" employer or to cause the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by*

[6] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, *e.g., California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *United States* v. *California,* 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States,* 289 U.S. 48 (1933); *Sanitary District* v. *United States,* 266 U.S. 405 (1925).

lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." (Italics added.)

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Fair Labor Standards Act. The activities undertaken by the governments of the several states are principally "governmental", not "proprietary". If the State ceased to perform such services (such as fire protection and law enforcement), it is unlikely that private enterprise would step in to fill the need.

The search for a "dependable touchstone" by which to determine whether State employees are engaged in commerce or in the production of goods for commerce "is as rewarding as an attempt to square the circle." *Kirschbaum* v. *Walling,* 316 U.S. 517, 520 (1942). The crucial test, however, would appear to be the nature of the activities of the employee and the character of his work. *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564, 571–572 (1943). It needs no extended argument to demonstrate that the better part of the activities of State employees are purely intrastate in nature. In no case to the knowledge of the State of California has this Court found a connection with interstate commerce on the bold assertion by the government that it is so. In each and every case reviewed,[7] there was a significant probe into those facts

[7] See, for example, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Darby,* 312 U.S. 100 (1941).

which could conceivably form a rational basis for the federal statute in question. Indeed, in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968) this Honorable Court on three separate occasions recited the importance of *judicial review* of Congress' exercise of the commerce power, even in the face of Congressional findings of an effect on commerce (*Ibid.,* p. 190). It was found that Congress has (as here) in some instances left to the Courts the question of whether commerce is affected (*Ibid.,* p. 192), and that the Commerce Clause cannot be used to destroy state sovereignty (*Ibid.,* p. 196). The Court held that it would examine federal statutes to determine the existence of a "rational basis" for regarding the statute as a regulation of commerce on a case-by-case basis (*Ibid.,* p. 198).

Appellant State of California recognizes that although the activities performed by State employees are for the most part "governmental", that there may be those employees who perform some "proprietary" functions (as in *Maryland* v. *Wirtz, supra,* 392 U.S. 185 (1968) and *United States* v. *California, supra,* 297 U.S. 175 (1936)). A statute can be supported even when applied to individual members of the class whose own activities ("governmental" in nature) may not have demonstrable impact on interstate commerce (such as those who perform "proprietary" functions). See *Perez* v. *United States, supra,* 402 U.S. 146, 152–154 (1970); *United States* v. *Hunter,* 478 F.2d 1019, 1021 (7th Cir. 1973); *Mandina* v. *United States,* 472 F.2d 1110, 1113 (8th Cir. 1973).

However, to say that Congress should be permitted to control *all* sovereign functions on the basis of the presence of a small number of "proprietary" activities by State government is to subvert the holdings of this Court which require that the means selected to combat a national evil under the Commerce Clause be reasonable and appropriate. *Heart of Atlanta Motel, Inc.* v. *United States, supra,* 379 U.S. at 258.

It needs no further argument to demonstrate that the issue in this case demands the Court's attention. The learned three-judge court below, "troubled by these contentions", took great pains to formulate what it considered to be a "difficult and substantial question of law." Without more, the lower court's forthright observations on the enormity of the constitutional problems presented by the federal amendments in question cry for immediate consideration and resolution by this Court.

Respectfully submitted,

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January 1975

EXHIBIT A

FILED
DEC. 31, 1974
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 74-1812

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v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Per Curiam:

Petitioners, individual cities and states, the National League of Cities, and the National Governors' Conference, challenge the 1974 amendments to the Fair Labor Standards Act (FLSA), Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. §§ 201 *et seq.* (1970), as beyond the power of Congress under the Commerce Clause in that they purport to extend the coverage of the FLSA to nonsupervisory state and municipal employees, including police and firemen. The amendments generally went into effect on May 1, 1974; provisions relating to overtime pay of police and firemen become effective on January 1, 1975. Plaintiffs seek a declaratory judgment and temporary and permanent injunctive relief. Defendant opposed a temporary injunction, and moved to dismiss the action for failure to state a claim upon which relief can be granted. A three-judge district court was duly convened. We grant defendant's motion to dismiss the complaint.

Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz,* 392 U.S. 183 (1968).[1] Upholding the constitutionality of an earlier extension of the FLSA to cover employees of state-operated schools and hospitals against an attack similar to that lodged here, Justice Harlan, writing for the court, found a sufficient and independent rational relationship of the provisions of the Act to interstate commerce in that state hospitals and schools were significant purchasers of out-of-state goods and that strikes and work stoppages involving their employees would consequently interrupt and burden the flow of goods across state lines. 392 U.S. at 194-95. Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

Although the theory described above was an explicitly independent ground for the decision, there is language in the opinion that stresses that the state competes with private institutions which also operate schools and hospitals.[2] The institutions whose em-

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[1] In this opinion we have not addressed ourselves to any issue concerning the regulations and rulings issued by defendant under the 1974 amendments, either as to procedure followed, or as to substantive compliance with the Act. These issues were not the core of the complaint filed, and the contentions may be presented by plaintiffs either by way of defense, or in actions for declaratory relief. *See* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971).

[2] *See, e.g.,* "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

ployees are in question here perform governmental functions, not seriously in competition with private industry. Moreover, there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time off arrangements, rather than time and half overtime pay, and through other local governmental agreements.[3]

Plaintiffs contend that the amendments will mean either increase in local government fiscal requirements, or reduction in services and personnel, with layoffs, or both, due to provisions in state and municipal constitutions, charters, statutes and ordinances, like those against deficit financing. Plaintiffs further contend that a large part of the budgets of state

[3] California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Council for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.

Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5–8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees.

and local governments reflect costs of non-supervisory personnel, and that the budgeting processes currently under way indicate that the amendments may have the practical impact of a large scale reconstitution of tours of duty, without any factual predicate showing that there has been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales. They contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

If, as we must assume, the amendments are constitutional, a preliminary injunction would be inappropriate. We have pondered the possibility of relief pending appeal, to assure opportunity to litigate, but, apart from jurisdictional doubts, we apprehend that the only assistance available from such relief would be this, that states failing to comply with the new provisions would not be exposed to the liquidated damages and double damage penalties provided for bad faith violations of the Act. However, we feel that since our opinion recognizes that plaintiffs have raised a substantial question regarding the amendments' constitutionality, this will be sufficient to indicate that the claim of the part of the cities and

states that the Act cannot be constitutionally enforced has been raised in good faith.

Plaintiffs' request for declaratory and preliminary injunctive relief is denied. Defendant's motion for dismissal is hereby granted. Because the papers before us include depositions and affidavits, and they should be part of the record in the event of an appeal to the Supreme Court, our order dismissing the complaint will be entered under both Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The foregoing will constitute our findings of fact and conclusions of law.

Accordingly, it is hereby ORDERED, pursuant to and in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure, that the complaint of the National League of Cities, et al., as amended December 31, 1974, and the complaint in intervention of the State of California, be, and they hereby are, dismissed with prejudice.

HAROLD LEVENTHAL
United States Circuit Judge

OLIVER GASCH
United States District Judge

BARRINGTON D. PARKER
United States District Judge

December 31, 1974

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EXHIBIT B

OFFICE COPY
ATTORNEY GENERAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES, et al.,
Plaintiff/Appellants,

and

THE STATE OF CALIFORNIA, et al.,
Plaintiffs-Intervenors/Appellants,

and

THE STATE OF INDIANA, et al.,
Plaintiffs-Intervenors/Appellants,

v.

THE HONORABLE PETER J. BRENNAN,
Defendant/Respondent.

Civil Action
No. 74-1812

FILED
JAN 8 1975
JAMES F. DAVEY
CLERK

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of California, et al., plaintiffs-intervenors/appellants, hereby appeal to the Supreme Court of the United States from the final Order dismissing the Complaint and Complaint in Intervention in this action, entered on December 31, 1974.

This Appeal is taken pursuant to 28 USC § 1253.

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CERTIFICATE

I hereby certify that I have served the foregoing Notice of Appeal upon defendant by mailing a copy, postage prepaid, this 3rd day of January, 1975, to Nathan Dodell, Esq., Assistant United States Attorney for the District of Columbia, United States Court House, Third and John Marshall Place, N.W., Washington, D.C. 20001, and to Mr. Lawrence Wallace, Deputy Solicitor General, Department of Justice, Washington, D.C., 20530.

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EXHIBIT C

STATUTES INVOLVED

The validity of the following provisions of Title 29 of the United States Code, § 201, *et seq.*, repealed or amended by the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259; 88 Stats. 55), are in issue herein:

"§ *203. Definitions*

"As used in this chapter—

" * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of Title 5),

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policy-making level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"* * *

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

"* * *

"(r) 'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more estab-

lishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

"(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

"(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

"(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

"(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

"(3) is engaged in the business of construction or reconstruction, or both;

"(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

"(5) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

"* * *

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency."

"§ *206. Minimum wage*

"* * *

"(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974, wages at the following rates:

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

"§ *207. Maximum hours*

"* * *

(k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

"§ *213. Exemptions*

"(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

"* * *

"(b) The provisions of section 207 of this title shall not apply with respect to—

"* * *

"(7) any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus

carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed, or

"* * *

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);"

"*§ 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.*

"* * *

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such

consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

"(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and

an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name

did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action."

o

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

THE STATE OF CALIFORNIA, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

On Consolidated Appeals From the United States District Court for the District of Columbia

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

THE STATE OF CALIFORNIA, et al.,
Appellants

v.

PETER J. BRENNAN,
SECRETARY OF LABOR

On Consolidated Appeals From the United States District Court for the District of Columbia

BRIEF FOR APPELLANT STATE OF CALIFORNIA

Appellant State of California appeals from the Judgment of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing with prejudice both the Complaint of the National League of Cities, et al., as amended, and the Complaint in Intervention of the State of California.

OPINION BELOW

The Per Curiam Opinion of the United States District Court for the District of Columbia, dated December 31, 1974, is not yet reported. A true and correct copy thereof is set forth in the Appendix (App. 643).

JURISDICTION

The action below was brought pursuant to the provisions of 28 U.S.C. §§ 1331, 1337, 1346, 2201 and 2202, as well as the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States (App. 6).

A three-judge district court was convened pursuant to 28 U.S.C. § 2282. Appellant State of California filed a Notice of Appeal from the adverse Judgment of the court on January 8, 1975 (App. 4).

Jurisdiction of this Court was invoked by appellant State of California in its Jurisdictional Statement pursuant to the provisions of 28 U.S.C. §§ 1253 and 2101(b), providing for direct appeal to the United States Supreme Court from an order of a district court of three judges denying interlocutory or permanent injunctive relief in a civil action or proceeding properly brought under an Act of Congress regulating commerce (28 U.S.C. § 1337).

On January 27, 1975, this Court noted probable jurisdiction and consolidated this appeal (No. 74-879) with that of the National League of Cities (No. 74-878).

QUESTIONS PRESENTED

1. Carefully balancing the respective interests of the federal and state governments, shall blanket coverage of the Fair Labor Standards Act to all state employees find support under the Commerce Clause so as to permit the regulation of indispensible and unique sovereign functions of State government which, unlike those activities presented in *Maryland* v. *Wirtz,* are not in competition with private industry and have no other rational connection with commerce?

2. Notwithstanding section 16 (29 U.S.C. § 216(b)) of the Fair Labor Standards Act, as amended in 1974, shall the sovereign states retain their Article III and Eleventh Amendment immunity from suit by their employees in a federal forum?

STATUTES INVOLVED

The pertinent sections of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259; 88 Stat. 55)[1] are set forth in full as "Exhibit A" hereto. The subject of this appeal is whether said statutes are constitutional as applied to State and local governments under the Commerce Clause (Art. I, § 8, cl. 3), and the Fifth, Tenth, and Eleventh Amendments to the United States Constitution.

[1] The sections referred to above amend or repeal various sections of the Fair Labor Standards Act of 1938 (29 U.S.C. §§201–219). The principal amendments in issue are those which are part of Section 6 of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259) entitled "Federal and State Employees".

STATEMENT OF THE CASE

By a Complaint for Declaratory Judgment, together with an Application for Preliminary Injunction, appellant National League of Cities, et al. filed this action in the United States District for the District of Columbia seeking injunctive and declaratory relief against various provisions (see "Exhibit A" hereto) of the Fair Labor Standards Act Amendments of 1974 which, for the first time in the 36-year history of the Fair Labor Standards Act of 1938, sought to impose federal requirements on the wages, hours, and working conditions of *all* Federal, State, and local government employees (App. 6). A three-judge District Court was duly convened (28 U.S.C. § 2282) (App. 1) and the matter of the preliminary injunction was set for December 30, 1974 (App. 1).

By an Order dated December 26, 1974, the Court granted the Motion of Appellant State of California to intervene as a party plaintiff and to fully participate in the Application for Preliminary Injunction set for December 30, 1974 (App. 2). The Complaint in Intervention of appellant State of California was also filed and served on that date (App. 43); the State's Application for Preliminary Injunction was filed on December 27, 1974 (App. 3).

Defendant Secretary of Labor, Peter J. Brennan, filed on December 27, 1974, a Motion to Dismiss the Complaint, and an Opposition to the Application for Preliminary Injunction (App. 3). The Motion to Dismiss was also set to be heard contemporaneously

with plaintiffs' Application for Preliminary Injunction (App. 3).

On December 30, 1974, the Applications of plaintiffs and plaintiffs-intervenors for a Preliminary Injunction, as well as defendant's Motion to Dismiss, came on regularly for hearing before United States Circuit Judge Harold Leventhal and United States District Judges Oliver Gasch and Barrington Parker. At that time, seventeen additional states were permitted to intervene as plaintiffs with the stipulation that, except as to plaintiff State of California, service of all pleadings on said intervening states would be effective by service on counsel for plaintiff National League of Cities, Mr. Charles Rhyne. Several depositions and affidavits were received into evidence (App. 86, 246, 311, 588, 591, 621, 625, 639) and the matter was argued and submitted for decision.

On December 31, 1974, the three-judge District Court below, in a Per Curiam Opinion, denied the Applications for Preliminary Injunction and dismissed the Complaint, as amended,[2] and the Complaint in Intervention.

Appellants National League of Cities, et al. (and the intervening States) filed their Notice of Appeal

[2] The lower court's Opinion (App. 643) is also addressed to an Amendment to paragraph 39 of the Complaint of plaintiff National League of Cities, which alleges a violation of the Fifth Amendment, United States Constitution, for the failure of appellee Department of Labor to give proper notice of its police and firefighter regulations (29 C.F.R. § 553, *et seq.*) prior to their effective date. The formal regulations pertaining to fire and police personnel were not published in the Federal Register until December 20, 1974, a mere eleven days before their date of implementation, January 1, 1975. A copy of said regulations is appended hereto as "Exhibit B".

on December 31, 1974. The Notice of Appeal of appellant State of California was filed on January 8, 1975 (App. 4).

SUMMARY OF ARGUMENT

The Fair Labor Standards Act Amendments of 1974, which seek to regulate the wages, salaries, and hours of virtually all employees of State government, is a patent denigration of the sovereign and reserved rights of the States to deal with their respective personnel and to conduct their manifest governmental activities. The Amendments touch the very heart of State sovereignty, nullifying numerous State statutes which regulate the wages and hours of State employees performing indispensable sovereign functions. On its face, the statute can be justified only if the Court accepts the bald premise that everyone but supervisory or executive personnel of a State are engaged in interstate commerce.

The 1974 Amendments are therefore inherently "suspect", requiring judicial review in a manner which transcends the usual inquiry of whether a "rational basis" exists for the statute. The government is required to bear the burden of establishing not only that the Amendments are supported by a compelling national interest, but that the application of the Act will not unduly interfere with the State's performance of its crucial public functions.

The 1974 Amendments are predicated in their entirety on this Court's decision in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Neither Congress nor the Court will find solace or support in *Wirtz* for the revolu-

tionary policies wrought by the omnibus blanket Amendments of 1974.

The Court must prevent Congress from extrapolating *Wirtz* to unjustifiable extremes. *Wirtz* itself recognizes that Congress may not use a relatively trivial impact on commerce as an excuse for the broad inclusion of all State activities as an "enterprise". Moreover, even assuming Congress could constitutionally define those sovereign functions said to affect commerce, the Act is conspicuously silent as to those specific State activities involving wages, salaries, or hours deemed to affect commerce. The statute fails under recent decisions of this Court which lament the lack of specificity in similar acts, leaving for judicial resolution an unlimited universe of nebulous connections with commerce.

As conceded by the lower court, virtually all of the economic activities of a State are "not in serious competition with private industry." The single factual predicate advanced by the lower court was the substantial purchase of goods and equipment in interstate commerce by State and local governments. However, such governments merely utilize their goods in the performance of essential public services, not for profit, and are therefore "ultimate consumers" traditionally exempt from coverage under the Act.

Section 16(b) (29 U.S.C. § 216(b)) of the Act, which was amended in order to subject the States to jurisdiction in the federal courts in actions by aggrieved employees, remains constitutionally infirm under both Article III and the Eleventh Amendment.

ARGUMENT

I. STRICTLY SCRUTINIZED, APPLICATION OF THE FAIR LABOR STANDARDS ACT TO ALL STATE EMPLOYEES IS NOT SUPPORTED BY A COMPELLING NATIONAL INTEREST. MOREOVER, WHEN THE RESPECTIVE INTERESTS OF THE FEDERAL AND STATE GOVERNMENTS ARE CAREFULLY BALANCED, THE ACT CANNOT BE APPLIED TO THE STATES UNDER THE COMMERCE CLAUSE SO AS TO REGULATE UNIQUE AND CRUCIAL FUNCTIONS OF STATE GOVERNMENT WHICH ARE NOT IN COMPETITION WITH, AND HAVE NO OTHER RATIONAL RELATIONSHIP TO, INTERSTATE COMMERCE.

A. By the 1974 Amendments to the Fair Labor Standards Act, Congress Has Touched the Very Heart of State Sovereignty. The Impact Is Enormous. The State Budget Must Be Restructured and Numerous State Statutes, Which Regulate the Wages, Hours, and Working Conditions of Employees Performing Indispensable Public Services Will Be Nullified.

1. *Background.* Since 1966, employees of State and local schools, colleges, hospitals, and other health care institutions have been subject to the wage-hour provisions of the provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060; 29 U.S.C. § 201 *et seq.*), as amended. In *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), this Court held that such legislation could be supported as a scheme necessary to protect commerce and to promote labor peace; that labor conditions in schools and hospitals can affect commerce; and that Congress interfered with State functions only to the extent that it subjected the States to the same wage

and overtime limitations as private employers who were engaged in *the same* economic activities.

On April 8, 1974, the President signed Amendments to the Act (Pub. L. 93–913; 88 Stats. 55), effective May 1, 1974, extending the minimum wage and overtime provisions of the Act to *all* Federal, State, and local government employees, except as to those employees who serve in "executive, administrative, or professional" capacities.[3] Fire protection and law enforcement personnel (including correctional personnel) were provided an exemption under section 13(b)(20) of the Act (29 U.S.C. § 213(b)(20)) until January 1, 1975, at which time such personnel were required to be *paid* premium overtime for tours of duty in excess of 240 hours in a work period of 28 days (60 hours for 7 days, or in a ratio of 240/28 for work periods between 7 and 28 days). By the new Amendments, in January of the following two years (1976 and 1977), premium compensation will have to be *paid* for work performed in excess of 232 and 216 hours, respectively, including ratios for premium pay for work performed beyond a 7-day work period. The new Amendments do not require weekly or semimonthly payments; however, minimum wage and overtime will be computed on the basis of hours worked each workweek.[4] Compensatory time off ("C.T.O.")

[3] Other provisions of the Act's Amendments require equal pay for employees of either sex performing substantially the same job; prohibit discrimination in employment to persons between 40 and 65 years of age; and prohibit child labor under certain ages for certain activities.

[4] A "workweek" is a regular recurring period of 168 hours in the form of seven consecutive 24-hour periods. "Hours worked" includes all time an employee is required to be on duty or on

taken in a later pay period does not meet the Act's new overtime provisions.

Section 16(b) (29 U.S.C. § 216(b)) of the Act was also amended so as to allow employees covered by the Act to bring an individual and/or class action in the Federal courts against his State or local employer for injunctive relief, including damages, fees, and costs of suit.

2. *Effect of the Subject Amendments on the State of California.* The Fair Labor Standards Act Amendments of 1974 will severely limit, if not altogether eliminate, the ability of the State of California to recognize the overtime hours of its employees in forms other than cash compensation. Numerous California statutes will be superseded and nullified by the federal amendments. For example, California Government Code sections 18021.5 and 18023 [5] allow the Cali-

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the employer's premises, at a prescribed workplace, and all times during which the employee is suffered or permitted to work. 29 U.S.C. § 207.

[5] California Government Code section 18021.5 provides as follows:

"The State Personnel Board shall provide the extent to which, and establish the method by which, ordered overtime or overtime in times of critical emergency is compensated. The board may provide for cash compensation at a rate not not to exceed 1½ times the regular rate of pay, and the rate may vary within a class depending upon the conditions of work, or the board may provide for compensating time off at a rate not to exceed 1½ hours of time off for each hour of overtime worked. The provisions made under this section shall be based on the practices of private industry and other public employment, the needs of state service, and internal relationships."

Section 18023 provides:

"The granting of compensating time off in lieu of cash compensation is not prohibited where compensating time

fornia State Personnel Board to provide for *either* case compensation *or* C.T.O. at 1½ times the regular rate of pay or hours worked ;C.T.O. may be taken up to a period of *12 months* following the overtime worked. Under the federal amendments, C.T.O. *must* be taken in a *28-day* work period or such personnel must be *paid* premium overtime.

The Federal statute, in one stroke, works to the disadvantage of employer and employee. The effect of the Act on State's fire suppression program is instructive. The extended statewide fire season (of 5 to 8 months' duration) frequently requires a "campaign" fire suppression program to be waged in California's vast mountainous regions. Members of the fire suppression classes in State service receive an additional 15% "fire mission pay" and, by Government Code section 18021.7,[6] may work *84 hours* per week (or *364 hours* per *calendar* month during a declared "fire mission" period) before overtime rules apply. The Department of Conservation, Division of Forestry, permits the taking of *cash* compensation for up to 40 hours earned overtime per year; all remaining earned

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off can be granted within twelve calendar months following the month in which the overtime was worked and without impairing the services rendered by the employing state agency."

[6] California Government Code section 18021.7 provides:

"It is the policy of the state that the normal workweek of permanent employees in fire suppression classes of the Division of Forestry shall not exceed 84 hours a week. Work in excess of the designated normal workweek may be compensated for in cash or compensating time off in accordance with the regulations of the State Personnel Board."

C.T.O. may be taken in the inactive winter months. Many employees utilizing C.T.O. work secondary jobs during these months. If the workweeks during the fire season workweeks are changed to accommodate the Act (as, for example, by assigning firefighting employees to four 12-hour shifts over a four-day period so as to effectuate a 48-hour workweek), the commuting distance to various remote ranger stations in the State would in many instances be too costly and time-consuming to the employee. The current work assignments [7] are satisfactory to California firefighters who desire longer periods with their families at home.[8]

Yet, by the federal amendments, such employees are now restricted to *60 hours* per workweek (or *240 hours* per *28-day* work period) and are precluded from utilizing all C.T.O. which is not taken during a 28-day work period. The wishes of the employer and the employee are lost to the irrational whim of Congress.

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[7] During the *non-fire season*, California firefighters work a 40-hour week, Monday through Friday, 8 hours per day. During the *fire season*, 84 hours are worked per week during a 2-week period as follows: four 24-hour days on, three 24-hour days off, followed by three 24-hour days on and four 24-hour days off. A work assignment of 8 hours per day for 5 consecutive days, which is purportedly the annual experience on the east coast, simply has no application to the untamed wildlands and forests of California during the fire season.

[8] By a Resolution adopted during the Annual Convention of the California Division of Forestry Employees' Association, during December 6–8, 1974, in Eureka, California, said Association in disapproving of the FLSA Amendments stated that "a significant reduction in hours worked could result in a severe curtailment of fire protection services to the public and an undesirable split shift for employees; . . .".

These and other effects of the federal amendments were referred to by the lower court as follows (App. 650):

> "California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.
>
> "Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees."

The State of California, by its verified Complaint in Intervention below, alleged an estimated *8 to 16 million* dollars by reason of the extension of the Act to State government, as well as an *additional* esti-

mated *6 million dollar loss* in the "Mutual Aid" fire program, *750,000 dollars* in California Highway Patrol Academy training, and an *inestimable* amount in meeting the record-keeping requirements of the Federal Act.[9]

Following promulgation of the Department of Labor's regulations pertaining to fire and police personnel on December 20, 1974 (See "Exhibit B" hereto), the California Department of Conservation, Division of Forestry, made an in-depth study of the fiscal impact of the Act on the State fire suppression program and concluded that the effect on that Department *alone* will exceed *23 million dollars.*[10] Appellant proceeds to a brief, general summary of such costs, followed by more specific examples of the Act's untoward consequences on the California Civil Service system within the Division of Forestry.

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[9] The National League of Cities has estimated the cost to States and Cities nationally to be approximately *200 million dollars.* The Government in its Motion to Dismiss and Opposition to the Application for Preliminary Injunction alleged that the actual fiscal impact of the Federal Amendments on the Nation was but *27 million dollars.* The Government's figure is ludicrous, irrespective of the dollar accuracy of plaintiff's estimate. In any event, the constitutional question presented here—the unprecedented federal regulation of *all* State and local government employees— is of such gravity as to render such a statistical confrontation by the parties immaterial.

[10] *Excluding* the Department of Conservation, the allegations of the Complaint in Intervention (assumed to be true for purposes of the Government's Motion to Dismiss. *Scheuer* v. *Rhodes,* 416 U.S. 232, 236 (1974)) set forth an impact of approximately *10,918,255 dollars* to other State programs. (See App. 74). Augmented by the estimate of the Department of Conservation (23,636,500 dollars) discussed above, the cost to all of California State government programs is *34,554,755 dollars.*

a. Costs to the California Department of Conservation in Each Type of Fire Suppression Program Affected.

(1) CONTRACT COUNTIES

California Public Resources Code, Section 4129, provides that any county may elect by ordinance to assume the responsibility for the prevention and suppression of all fires on all land within the county, including an area of State responsibility. Further, Public Resources Code Section 4142 authorizes the California State Forester, with the approval of the Director of General Services, to enter into cooperative agreements for the purpose of preventing and suppressing fires in any lands within any county, city or district which makes an appropriation for such purpose. Under the provisions of these statutes, the State Forester has contracted with five counties: Kern, Los Angeles, Marin, Santa Barbara and Ventura.

The State Forester is authorized to allocate those funds which the Division would normally have spent in these counties for wildland fire protection to the county directly. The dollar impact on this program by virtue of the Fair Labor Standards Act Amendments of 1974 is---------- $1,680,000

(2) U.S. FOREST SERVICE CONTRACT PROTECTION

The U.S. Forest Service maintains a substantial organization for the protection from fire of wildland resources located in 18 national forests in California. Intermingled with the Federal land is State and privately owned land that has been classified as state responsibility area. Under the authority of Section 4141

of the California Public Resources Code the protection of this state responsibility area is contracted by the State (through the Division of Forestry) to the Forest Service to avoid duplication of forces. The contract provides support for salaries and wages and operating expenses for men and equipment at the level which the Division of Forestry provides to comparable areas within its own protection area. The fiscal impact of the Fair Labor Standards Act on this program is ---------- $750,000

(3) CALIFORNIA DIVISION OF FORESTRY DIRECT PROTECTION

The Division of Forestry directly protects more than 23 million acres of State responsibility area throughout California. In addition to protecting State responsibility area, the Division of Forestry provides wildland fire protection to intermingled federally owned lands throughout California. In total, the Division directly protects about 28 million acres. To fulfill its responsibility, the Division maintains one of the largest fire protection organizations in the nation. The fiscal impact of the Fair Labor Standards Act is:

Permanent personnel -----	$8,350,000
Seasonal Fire Fighters----	3,970,000
Training Programs ------	602,400
Total ----------	$12,922,400

(4) LOCAL GOVERNMENT FIRE PROTECTION PROGRAM

The Division of Forestry provides structural fire protection on a contractual basis to several forms of

local government. The protection provided through these contracts is of local responsibility and is authorized under Section 4142 of the California Public Resources Code. The levels of protection provided, as well as the periods during which the forces are contracted, differ considerably according to local desires. The cost for this program is borne by those local governments involved. While these *local* costs do not affect the *State's* protection budget, they are part of the total fire protection system operated by the Division and give insight into the full impacts of the Fair Labor Standards Act.

The *estimated* cost increase to local government contracting with the Division of Forestry for structural fire protection is ---------- $8,284,100

The *grand total* of the dollar impact on all Division of Forestry protection programs, including local government, is therefore ---------- $23,636,500 [11]

b. Adverse Effects on Civil Service Within the California Division of Forestry Since May 1974.

Currently 4,766 employees of the California Department of Conservation, Division of Forestry, are subject to the provisions of the Fair Labor Standards Act under the 1974 Amendments. Since the implementation of the Act to these employees in May 1974, millions of dollars have been spent for administering the identical public services provided prior to the Amend-

[11] These figures are, by necessity, estimates based on the assumptions of maintaining the same level of protection and converting to a 60-hour workweek.

ments. Various personnel practices within the Department have also been adversely affected. These effects may be summarized as follows:

(1) ADDITIONAL (AND UNNECESSARY) SEASONAL FIREFIGHTERS.

By using the Department of Labor's method for calculating hourly rates, the Department of Conservation has determined that seasonal firefighters were being paid at $1.01 per hour. Their duty week was immediately reduced by one-half to 60 hours, which effectively raised their hourly rate of pay to $2.02. Since the duty week was reduced by 50 percent, it mandated that nearly twice the previous number of firefighters be hired. Hiring the additional seasonal firefighters and adding support personnel cost the Department approximately *5.4 million dollars.*

(2) CALIFORNIA ECOLOGY CORPS—REDUCTION IN MANPOWER AND FACILITIES.

The Department of Conservation noted the same Federal minimum wage violation for Forestry's Ecology Corps personnel.[12] Their hourly rate was 75 cents; however, room and board, insurance and uniforms were supplied as part of their compensation. To comply with the Department of Labor procedures, Ecology Corps employees' hourly rate was raised to $1.90 ($2.00 January 1, 1975) and they were charged for meals and housing. This method had a cost impact of approximately *one million dollars per year.*

[12] The California Ecology Corps is a State effort to provide work for the unemployed, many of whom are veterans.

As a result of the Fair Labor Standards Act, the Division will reduce the number of its Ecology Corps Centers from 8 to 5 and will reduce the manpower complement at one other center from 80 to 60 corpsmen. This will result in 200 less jobs.

(3) LOSS OF ADDITIONAL "FIRE MISSION" PAY.

In early June 1974, the Department of Conservation determined that the following forestry classes appeared not to meet the fire protection exemption in the Fair Labor Standards Act: Forestry Cook I & II, Civil Engineering Technician II, Equipment Maintenance Supervisor, Materials & Stores Supervisor I, Heavy Equipment Mechanic, and Fire Lookout (seasonal). Therefore, these classes were returned to their non-fire mission assignment duty weeks and rate of pay, with the exception of Lookouts, who remained on fire pay. There does not appear to be any appreciable cost increase from this action; however, a substantial number of employees in these classes lost between 5 percent and 15 percent pay for "fire season" work.

(4) SALARY COMPACTION BETWEEN EXEMPT AND COVERED CLASSES UNDER A "PLANNED OVERTIME" PROGRAM.

Fair Labor Standards Act will cause compaction problems between the State Forest Ranger I and II classes (exempt from the Federal Act), and those of the Fire Captain and Fire Crew Supervisor (covered by the Act). To minimize the cost of implementing the Fair Labor Standards Act provisions, the Department of Finance has instructed the Department of Conservation to use "planned overtime" during the 1975 fire season. However, this alternative creates a

severe compaction problem between the Fire Captain, Fire Crew Supervisor *fire suppression classes* and State Forest Ranger I and II *supervisor classes.*

The following two tables clearly illustrate this problem:

	Pre-FLSA	*FLSA*
Fire Captain	$1079–$1311	$1233–$1498 [13]
Fire Crew Supervisor	$1190–$1445	$1360–$1650 [13]
State Forest Ranger I	$1319–$1595	$1319–$1595
State Forest Ranger II	$1445–$1758	$1445–$1758

The first ("Pre-FLSA") column depicts the current salary relation between the four listed classes. Column two ("FLSA") depicts the actual guaranteed monthly salary by using planned overtime under the Fair Labor Standards Act. Fire Captains and Fire Crew Supervisors will be on planned overtime and State Forest Ranger I and II's, exempt from the Fair Labor Standards Act, will continue on their present workweek and salary. Note that the Pre-FLSA salaries do not progress as they do in the column representing the FLSA salary profile. A Fire Captain at maximum ($1498) would be compensated at a higher rate than a State Forest Ranger I at first ($1319) or second step ($1385) in the range. A Fire Crew Supervisor, at a starting salary of $1360 would have a higher salary in all steps than would a Ranger I, and would be compensated higher than a first step ($1445) Ranger II. It will be very difficult for the Ranger class to accept this arrangement for an extended period of time. Accordingly, acceptable salary progressions can be maintained only during non-fire mission assignment.

[13] All salaries rounded to nearest dollar.

B. Judicial Review of the 1974 Amendments Transcends the Usual Inquiry of Whether a Rational Basis Exists for the Act. Rather, Because the Statute is Facially Suspect, the Government Bears the Burden of Establishing That the Federal Regulation of Virtually All State Salaries Is Supported by a Compelling National Interest and, if So Supported, That Such Regulation Will Not Unduly Interfere With the State's Performance of Its Sovereign Functions.

The preceding argument manifestly demonstrates the depth to which Congress has intruded into the very halls of the legislatures of the sovereign States, regulating the mode and method of compensation of their employees which, since 1880, have heretofore been reserved powers of the States. *Newton* v. *Commissioners,* 100 U.S. 548, 559 (1880). Even as early as 1900 this Court held that it is essential to the independence of the States that such powers be exclusive and free from external interference, except as plainly provided to the contrary by the United States Constitution. *Taylor* v. *Beckham,* 178 U.S. 548, 570–571 (1900). More recently, this court has found that a State has a valid interest in preserving the fiscal integrity of its programs, and may legitimately limit its expenditures, whether for public assistance, public education, *or any other purpose. Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). In the same fashion, what a State pays its employees has, to this point, been an indispensable sovereign function of State government, upon which the integrity of all its various programs depends.

Application of the Fair Labor Standards Act of 1938 under the 1974 Amendments to *all* State and local employees constitutes and unprecedented interference by Congress with the rights and prerogatives of State and local government over the manner in which the wages, hours, compensable time, and other personnel matters are established and administered. The net effect is to confer upon Congress and Federal administrative agencies outright control of local employees who occupy purely *governmental* positions—created by local government, paid with funds raised by local government, and performing indispensable services entirely intrastate in character. On its face, the Act constitutes an unwarranted invasion by the Federal Government into sovereign governmental activities which are unique to the States and essential to their preservation as a viable part of our Federal system of government. *See, e.g.,* fn. 25, *infra,* p. 47. Such action cannot be justified by congressional power to regulate commerce, and is facially suspect in view of the Tenth Amendment to the United States Constitution, which provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This case, not unlike *Fry* v. *United States,* No. 73-822 [14] (submitted for decision November 1974),

[14] The State of California has filed a Brief as Amicus Curiae in Support of Petitioners in that case.

presents for this Court the crucial question of whether Congress, given what it deems to be sound action for the national economy, may intrude into the substantial internal budgetary activities[15] of a State in the interest of promoting commerce. In *Fry,* the issue is whether the Economic Stabilization Act of 1970, controlling the *ceiling* of State wages and salaries, is constitutional under the Commerce Clause. Here, the other extreme must be resolved—viz., whether the Fair Labor Standards Act, controlling the *minimum* amount of wages and salaries to be paid to State employees may seek and find the same constitutional support.

Appellant State of California respectfully submits that because this case (as well as *Fry*) entails a patent federal attempt to regulate *all* sovereign activity, without the benefit of even a superficial attempt by Congress to isolate that State activity deemed to "affect" commerce, that this Court should invoke a test of strict scrutiny of the statute, akin to that which is used to measure the constitutionality of Federal statutes which involve "suspect classifications" or which touch on "fundamental interests." See and compare *Shapiro* v. *Thompson, supra,* 384 U.S. 618,

[15] The California Department of Finance has estimated that for the ensuing Fiscal Year 1975–1976, the cost for the personal services (including salaries and wages) of state employees is 76 percent of the total State operations budget. The salaries of Federal employees make up at least 25 percent of Federal budget outlays. See *Recent Federal Personnel Cost Trends* (Tax Foundation Inc., Government Finance Brief No. 24; December 1973 [1974]), page 20. Of course, these figures must be tempered by the fact that "executive, administrative, or professional" personnel are exempt from coverage under the Act.

638 (1969); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). Normally, the Secretary of Labor has the burden of proof on the issue of whether the activities in question find coverage under the Act. See *Anderson* v. *Mt. Clemens Pottery Company*, 328 U.S. 680, 686–687 (1946). Because the Fair Labor Standards Act Amendments of 1974 are so facially suspect, appellant State of California respectfully submits that the Government should be required to bear the burden of establishing that the federal regulation of virtually all State salaries is supported by a compelling national interest and, if so supported, that such regulation will not unduly interfere with the State's performance of its sovereign functions.

The unprecedented Federal intrusion at hand goes to the entire operation of the State governments, and thereby offends not only the Tenth Amendment, but the entire concept of federalism which was a predicate for the establishment of the Constitution. The very structure of that supreme document assumes that States operate as governmental entities sovereign in their sphere. Thus, in *Knapp* v. *Schweitzer*, 357 U.S. 371, 376 (1958), the Court stated:

> "The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation. The crucial difference between federalisms is in a wide sweep of powers conferred upon the central government with a reservation of specific powers to the constituent

> units as against a particularization of powers granted to the federal government with the vast range of governmental powers left to the constituent units."

This is the reasoning given for numerous decisions on intergovernmental immunities. See, e.g., *Collector* v. *Day,* 78 U.S. (11 Wall.) 113 (1870); *cf. New York* v. *United States,* 326 U.S. 572 (1946). See Black, "Structure and Relationship in Constitutional Law" 7 (1969). Constitutional demands protecting the federal system emanate not only from the Tenth Amendment, but from the relationships created by the entire Constitution. For example, equality of states in the Senate is the only provision of the Constitution which may not be amended (U.S. Const., Art. I, §§ 2, 3, and 4); the State legislatures are given specific functions in the Constitution with respect to electors for president and vice-president (U.S. Const., Art. II, §§ 2 and 3); and the Eleventh Amendment prohibits suits in Federal forums against a State by its own or other citizens. California submits that the rights of a sovereign State, recognized throughout the Constitution like those of the citizens of the United States should, as here, be protected under the Fifth Amendment from the arbitrary abuse of the Commerce Power by Congress. *United States* v. *Carolene Products Company,* 304 U.S. 144, 147–148 (1938).

The power of Congress to tax (Art. I, § 8) has been discussed in the context of requiring that the

exercise of such power not "interfere unduly with the State's performance of its sovereign functions of government." *New York* v. *United States,* 326 U.S. 572, 586–587 (1946) (Stone, C. J., concurring); *McCulloch* v. *Maryland,* 4 Wheat. 316, 431 (1819) ("The power to tax involves the power to destroy.").[16] Stated another way, the distinction to be drawn is between "the State as government and the State as trader." *New York* v. *United States, supra,* at 579. The Federal taxing power may not be used to regulate matters of State concern where the commerce power is inapplicable. See *U.S.* v. *Constantine,* 296 U.S. 287 (1935). The converse should also be true: The Commerce power should not be used to regulate matters of State concern where the taxing power is inapplicable.[17]

Each time Congress is allowed to interfere with sovereign State functions by the device of the Commerce Clause it has advanced one step towards the destruction of the States as an effective political entity.

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[16] Justice Holmes, dissenting in *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, 223 (1928) felt that such power would not be abused ". . . while [the United States Supreme Court] sits."

[17] In *New York* v. *United States, supra,* 326 U.S. 572, 582 (1946), the Court stated:

> "Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce. There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a State-house; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State."

Therefore, the need for the preservation of a Federal form of government requires that judicial limitations be placed on this congressional power. This Court has found such limitations on the taxing power to be implied in the Constitution. The same limitations have not been explicitly placed on the Commerce Clause because, to this point, it had been assumed that the application of the commerce power would not be as great as that of the power to tax. In view of the Fair Labor Standards Act Amendments of 1974, that assumption can no longer be relied upon.

The specter of Federal regulation of the wages and hours of the employees of the sovereign State governments not only offends the Tenth Amendment, but is a patent threat to the life and integrity of our Federal system of government and a proposition which the framers of the Constitution would abhor. Such an interpretation of the Commerce Clause would be beyond the understanding of the ratifiers who understood the purposes of the new power to be to halt the erection of trade barriers by the States against each other and not to permit regulation of the States' own government. See *Madison, The Federalist, No. 42*; *Frankfurter, The Commerce Clause under Marshall, Taney and Waite* (Univ. N. Car. Press, 1937), 12–13. It was understood by the States that the commerce power would be used to protect them from destroying each other commercially and not as a weapon to be used by the Federal government *against* the States. In adopting the Constitution the states did so with the understanding that they were to be an integral

part of the new Federal system without fear of Federal encroachment on their authority through use of the new central power. As stated by Hamilton, an advocate of a strong national government: "It may safely be received as an axiom in our political system, that the State Government will, in all possible contingencies, afford complete security against invasions of the public liberty by the National Authority." *Hamilton, The Federalist No. 28.*

Madison, in *The Federalist No. 45,* described the respective powers of the two sovereignties:

> "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. Powers reserved to the several States will extend to all the objects, which come under the ordinary course of affairs, concerning the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State."

Although there was little opposition to the delegation of the commerce power, the States were still concerned over the degree of control over State government which the national government might have been authorized to exercise under the new Constitution. Several States ratified the Constitution only upon the

condition that certain amendments be added including one which would reaffirm the understanding that the powers not delegated to the national government were reserved to the States, free from national interference. At the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last being the Tenth Amendment.

The Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular State or national power. *United States* v. *Spragg,* 282 U.S. 716 (1931); *United States* v. *Darby,* 312 U.S. 100, 124 (1941). However, it did confirm the understanding that the Federal government was one of specific powers, that all powers not specified were reserved to the States or the People. It is clear that the States did not intend to create a national government which could, under any of its given powers, unduly interfere with the operation of State government, including use of the Commerce Clause, adopted merely to give the Federal government the power to prevent State tariff barriers. The Tenth Amendment indicates that the framers saw a distinction between the powers necessary to a Federal government and the preservation of State sovereignty in control of its internal affairs.[18]

[18] "There is common area where the necessary power of the federal government coexists with the sovereignty of the state regarding matters occurring within it. Since this common area was not a part of the framers' conceptions, it is impossible to look to the framers' intent to discover how it would be resolved. To the extent that such an overlap was perceived, the working of the Tenth Amendment as a residual clause suggests it was resolved in favor of national power. *However, the framers probably did*

This Court has repeatedly found this to be the framer's clear intent. An exemplary expression of the historical establishment of the respective powers of the national and State governments was set forth ("perhaps at unnecessary length", 298 U.S. at 297) by Justice Sutherland in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294–296 (1936):

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated —with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, 'when it was found necessary to establish a national government for national purposes,' this court said in *Munn* v. *Illinois,* 94 U.S. 113, 124, 'a part of the powers of the States and of the people of the States was granted to the United States and the people of the

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not foresee that such a resolution could eventually lead to federal power to control all conduct within a state." (Emphasis added.) Bogen, "The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause", 8 Wake For. L.Rev. 187, 194 (Mar. 1972).

United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.' While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector* v. *Day,* 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U.S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider. See, however, *Jones* v. *United States,* 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 705 *et seq.; Burnet* v. *Brooks,* 288 U.S. 378, 396.

"The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* v. *White,* 7 Wall. 700, 725—'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

Since *Carter,* this Court has spoken often of the merits inherent in maintaining and protecting our federal system of government. See, e.g., *Maryland* v.

Wirtz, 392 U.S. 183, 201 (1968) (Douglas and Stewart, JJ., dissenting); *Pointer* v. *Texas,* 380 U.S. 400, 414 (1965) (Goldberg, J., concurring); *Ker* v. *California,* 374 U.S. 23, 31 (1963) (Clark, J.,); *Johnson* v. *Louisiana,* 406 U.S. 356, 376 (1972) (Powell, J., concurring); see also Note, *State Sovereignty as a Limitation Upon the Federal Commerce Power,* 45 Yale L.J. 1118 (1936).

Mr. Justice Black, speaking for the Court in *Younger* v. *Harris,* 401 U.S. 37, 44–45 (1971) spoke affectionately of "Our Federalism" as follows:

> ". . . the entire country is made up of a Union of separate state governments, and . . . will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in

> ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

It is hoped that the "ideals and dreams" of continued "Federalism" articulated by Justice Black will not be lost nor bent to the fleeting expediency brought about by statutes promulgated by a "transient majority of Congress" *New York* v. *United States,* 326 U. S. 572, 594 (1946) (Douglas and Black, JJ., dissenting); *Williams* v. *Florida,* 399 U. S. 78, 133 (1970) (Harlan, J., concurring and dissenting); see also *Coan* v. *State of California,* 11 Cal. 3d 286, 520 P. 2d 1003 (1974) (Mosk, J., concurring).

In *Mitchell* v. *Zachry Co.,* 362 U.S. 310 (1960), this Court found that the Fair Labor Standards Act manifests Congress' concern *not* to impinge upon matters of local interest. Congress did not imbue the Act with its full power under the Commerce Clause (at 316 of 362 U.S.):

> "For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character."

The Court also accentuated the need to resort to practical considerations in construing the Act, not "talismanic or abstract tests, embodied in tags or formulas." 362 U.S. at 313.

It is submitted that the "rational basis" test, used by this Court to gauge the constitutionality of the 1966 Amendments to the Act in *Maryland* v. *Wirtz, supra,* 392 U.S. 183, 190 (1968), can have no application to the omnibus, blanket coverage of *all* State employees under the Amendments of 1974. *See, e.g.,* fn. 24, *infra* p. 47. Application of the "rational basis" analysis would be at best superficial inasmuch as Congress has conveniently (but conspicuously) been silent with respect to those identifiable State functions which are deemed to "affect" commerce. A test of "strict scrutiny" is therefore required to test the fabric of such a novel proposition. Appellant State of California submits that such "strict scrutiny" will of necessity require that the Government establish a compelling national interest for the statute and, if so established, that the Court carefully balance said national interests with the need to minimize interference with essential functions of State Government. See and compare *Hodgson* v. *Hyatt Realty and Investment Company, Inc.,* 353 F. Supp. 1363, 1368–1370 (M.D. No.Car. 1973).

C. This Court Should Prevent Congress from Extrapolating Its Decision in *Maryland* v. *Wirtz* to Unjustifiable Extremes and from Attempting to Regulate Essential Sovereign Functions under the Guise of the Commerce Clause. *Wirtz* has No Application to the Omnibus Blanket Amendments of 1974.

The Fair Labor Standards Act Amendments of 1974 are predicated in their entirety on this Court's deci-

sion in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968). Indeed, *Wirtz* was not only a principal justification advanced by Congress in its House Report (H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974) but has been repeatedly cited by the Government in every paper and pleading which gave rise to this appeal.

Neither Congress nor the Government will find little if any solace in *Wirtz* for the novel and revolutionary aims wrought by the Amendments of 1974.[19] Thus, in *Wirtz,* this Court made repeated reference to the importance of judicial review and the need for a significant probe into facts which could conceivably form a "rational basis" for the Federal statute. The Court emphasized the vital nature of judicial review of Congress' exercise of the commerce power even in the face

[19] Prior to their adoption, these and similar Amendments were repeatedly opposed on the grounds that they unduly interfered with the prerogatives of local government. See, e.g., Hearings on H.R. 7130 Before the Subcom. on Labor, House Comm. on Educ. and Labor, 92nd Cong., 1st Sess. pt. 1 at 522 (1971); Hearings on S. 1861 & 2259 Before the Subcom. on Labor, Sen. Comm. on Labor and Pub. Welf., 92nd Cong., 1st Sess. pt. 1 at 29 (1971) (testimony of Secretary of Labor Hodgson); Hearings on H.R. 4757 and H.R. 2831 Before the Subcom. on Labor, House Comm. on Educ. and Labor, 93rd Cong., 1st Sess. at 263 (1973) (testimony of Secretary of Labor Brennan). President Nixon, in vetoing virtually identical amendments in 1973, agreed (119 Cong. Rec. H. 7596; September 6, 1973). Senator Dominick of Colorado expressed it succintly: "As to local employees, how in the name of heaven do we have a right in the Federal Government to determine what wages are to be given to an employee of a local school district? *Where do we get the brains to determine what employees are going to get in sanitation districts or in other institutions or departments in the various States? How are we going to determine what every local jurisdiction is going to pay an employee in every local agency in the 50 States?*" (118 Cong. Rec. S. 11376; July 20, 1972). (Emphasis added.)

of Congressional findings [20] of an effect on commerce (*Ibid.*, p. 190); that Congress has (as here) in some instances left the question of whether commerce is affected to the Courts (*Ibid.*, p. 192); that the Commerce Clause could not be used to destroy State sovereignty (*Ibid.*, p. 196); and that whether the statute was a proper regulation of commerce would have to be decided on a case-by-case basis (*Ibid.*, p. 198).

The learned District Court below, "troubled" by the contentions raised by appellants, found *Wirtz* to be dispositive for the *single reason* "that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments *do make substantial purchases in interstate commerce of equipment and other goods . . .*" (Emphasis added.) (App. 649). A contention of the Government that the State and local governments "compete" with private industry was expressly rejected (App. 650).

For the reasons given below, appellant State of California submits that *none* of the various rationales advanced by the Government for the omnibus blanket Amendments of 1974 will find support in fact, or in the Constitution.

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[20] In *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court noted that " . . . the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court."

1. In *Wirtz*, this Court recognized that Congress may not use a relatively trivial impact on commerce as an excuse for the broad general regulation of State activities as an entire, undivided, amorphous "enterprise". Despite the current efforts of Congress, the State is not an "enterprise".

The majority of this Court in *Wirtz*, responding to the dissent of Justices Douglas and Stewart, allayed the fear of the States that Congress could, or would, proceed to declare the States to be individual "enterprises" affecting commerce within the Fair Labor Standards Act and thereby absorb or imperil the budgeting activities of the sovereigns (at n. 27 of 392 U.S. 183):

> "The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole State an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard* v. *Filburn, supra,* and of our decision. The Act's definition of 'enterprise' reads in part as follows:
> ' "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . but shall not include the related activities performed for such enterprise by an independent contractor. . . .' 29 U.S.C. § 203 (r). We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group

> of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. *Neither here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.* The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." (Emphasis added.)

By the 1974 extension of the Fair Labor Standards Act to virtually *all* State employees, without delimitation as to the type or character of the employee's work (see *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572 (1943)), the fears of Justices Douglas and Stewart, the States, and even the majority of the Court in *Wirtz*, are now a frightening reality.

a. As acknowledged by recent decisions of this Court, whether the State is an "enterprise engaged in commerce or production of goods for commerce" under the 1974 Amendments must be determined as a matter of statutory history and interpretation without reference to an unlimited universe of nebulous connections with commerce.

There can be little question that a mere Act of Congress may not negate those sovereign functions of a State essential to its proper functioning. See *Ashton* v. *Cameron County District*, 298 U.S. 513, 531 (1936).

Congress has amended section 3(s) (29 U.S.C. § 203 (s)) of the Act so as to include "public agency"

(such as "a State", 29 USC § 203(x)) within the definition of an "enterprise". Such a broad inclusion implies that, by definition, the State is engaged in (or affects) interstate commerce to such an extent that *all* State functions, whether "proprietary" or "governmental", are now subject to the fiscal restraints or mandates of Congress.

The State is not an "enterprise". The language of the majority in *Wirtz,* set out *supra* (n. 27, 392 U.S. at 196–197), makes abundantly clear that the "enterprise" concept should be confined to those operations of an entity whose employees' wages and hours significantly affect interstate commerce. However, in contravention of this Court's limiting language, by the 1974 amendments Congress has used "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities" (*Ibid.*). The Statute must therefore fail.

In *Gulf Oil Corp.* v. *Copp Paving Co., Inc.,* ____ U.S. ____, 43 U.S. Law Week 4059 (95 S.Ct. 392) (December 17, 1974), the questions before the Court were whether a California firm engaged in entirely intrastate sales of asphaltic concrete, marketed locally, was a corporation "in commerce" within the meaning of the Robinson-Patman Act (15 U.S.C. § 13) and Clayton Act (15 U.S.C. §§ 14, 18) and further, whether sales by the firm were "in commerce" and "in the course of such commerce" within the meaning of said Acts. Such questions were resolved in the negative. To the Government's argument that the broad

language of these Acts would include "any conduct" with respect to an ingredient of commerce, the Court found (at 4063 of 43 U.S. Law Week):

> "The universe of arguably included activities would be broad and its limits nebulous in the extreme....
>
> "... The justification for an expansive interpretation of the in commerce language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts reach all practices, even those of local character, harmful to the national marketplace. This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets."

The Court therefore held that by the specific statutory language of the Acts, more than activities which merely "affected" commerce was required (see also: *American Radio Association* v. *Mobile Steamship Association*, ____ U.S. ____, 43 U.S. Law Week 4068 (95 S.Ct. 409) (December 17, 1974). The Court rejected efforts of the Government (and of Justice Douglas, dissenting) to apply cases decided under the Fair Labor Standards Act. The Court held that such cases were distinguishable for the reason that they involved *specific* local activities deemed by Congress to suffi-

ciently implicate interstate commerce. Said the Court (at n. 12, 43 U.S. Law Week at 4062):

> "The jurisdictional inquiry under general prohibitions like these Acts and § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required *when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation.* Compare *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 232–233 (1947), with, *e.g.*, *Perez* v. *United States*, 402 U.S. 146 (1971); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)." (Emphasis added.)

In view of the Tenth Amendment, it is doubtful that Congress can constitutionally define and control all sovereign functions. However, assuming the existence of such power, at the very least *Wirtz* requires that Congress adequately define "the specific persons and activities" affecting commerce.

Whether the State of California is an "enterprise" must therefore be determined without reference to an unlimited universe of undefined connections with commerce. Moreover, even if such a broad inclusion could be constitutionally founded, the State is an "ultimate consumer" of the goods which it purchases and is therefore exempt from coverage by section 3(i) (29 U.S.C. § 203(i)) of the Act. This in turn is discussed below.

b. Although *Wirtz* would subject the State to the Act by virtue of the mere purchase of goods which have moved in interstate commerce, even the Act itself recognizes that the "ultimate consumers" of such goods are exempt. The State, which merely utilizes all of its goods in the performance of essential public services, and not for profit, is an exempt "ultimate consumer".

In upholding the constitutionality of the 1974 Amendments, the lower District Court felt compelled to apply this Court's decision in *Wirtz* for the reason that "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods . . . ." (App. 649). However, it is clear that in the absence of a more specific finding by Congress, section 3(i) of the Act (29 U.S.C. § 203(i)) exempts State and local governments from the Act as "ultimate purchasers" of such goods. See generally *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 513 (1949).

This Court may well take judicial notice of the fact that the State and local governments which purchase interstate goods do so for the purpose of providing public services, not for the purpose of making a profit. Thus, for example, it has been found that even the *United States Government* is an "ultimate consumer" of certain radar equipment as to employees contracted to work upon the equipment in vessels which did not move in interstate commerce. (*Divins* v. *Hazeltine Electronics Corp.*, 163 F.2d 100, 104 (2d Cir. 1947));

and that a local independent contractor, in the business of garbage and refuse collection solely intrastate, was an "ultimate consumer" exempt from coverage under the Fair Labor Standards Act as to gasoline, motor oil and lubricants, purchased in interstate commerce, but which were merely used and not resold. (*Brennan* v. *Industrial America Corporation,* 371 F.Supp. 1164 (M.D. Fla. 1974)).

Recent attention has been given by the Federal Circuit Courts of Appeal to the question of whether goods used by "proprietary" enterprises for purely local, intrastate purposes nevertheless involve an implied "resale" of the goods, negating the "ultimate consumer" exemption. In *Brennan* v. *Dillion,* 483 F.2d 1334 (10th Cir. 1973), the Court cited three District Court cases on each side of the issue (*Ibid.,* p. 1336) then adopted the "resale" theory in finding that apartment house owners were passing on the cost of paint, light bulbs, soap, and the like to their tenants in the form of increased rent. However, such a "resale" theory would find difficult application to the performance of sovereign functions of the States.[21]

[21] We note that in *Brennan* v. *Iowa,* 494 F.2d 100 (8th Cir. 1974), the Court of Appeal for the Eighth Circuit has held that nine Iowa hospitals were not the "ultimate consumers" of goods (bedding, linens, towels, hospital clothing, medical supplies, etc.) inasmuch as the types of institutions in question were found by this Court in *Wirtz* to be "enterprises engaged in interstate commerce." (*Ibid.,* p. 104). Appellant State of California understands the case to be on appeal. Nevertheless, it has little relevance to the broader question raised by the 1974 Amendments—namely, may undefined "enterprises" of the State (or the State itself as an entire "enterprise") enjoy the "ultimate consumer" exemption of the statute. *Ibid.,* pp. 105–107 (Gibson, C. J., dissenting).

2. In *Wirtz*, this Court acknowledged that the ability of Congress to interfere with essential State functions is limited to those economic activities that are engaged in by private persons. The State provides essential public services which, as conceded by the lower court, are "not seriously in competition with private industry."

The lower court has found that the employees of state and local institutions covered by the 1974 Amendments "perform governmental functions not seriously in competition with private industry." (App. 650). This finding was reached in light of language of this Court in *Wirtz* which stressed the "competitive" or "proprietary" nature of the activity sought to be covered:

> "If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons,* the State too may be forced to conform its activities to federal regulation." (Emphasis added.) *Maryland* v. *Wirtz, supra,* 392 U.S. at 197.

In *Wirtz,* this Court also stated (at 193–194 of 392 U.S.):

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions *it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."* (Emphasis added.)

The "competitive" or "proprietary" nature of the State activity in question was emphasized again in

Employees of the Department of Public Health and Welfare v. *Missouri*, 411 U.S. 279 (1973). There, this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964)) which upheld under the Commerce Clause Federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[22] The Court refused to place the State in the position of a "proprietary" employer or to cause the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.*" (Emphasis added.)[23]

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Fair Labor Standards

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[22] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, e.g., *California* v. *Taylor*, 353 U.S. 553 (1957); *California* v. *United States*, 320 U.S. 577 (1944); *United States* v. *California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States*, 289 U.S. 48 (1933); *Sanitary District* v. *United States*, 266 U.S. 405 (1925).

[23] That the "proprietary" and "governmental" distinctions of State activities were fostered by the majority opinion in the *Employees* case is demonstrated in the extensive dissent of Justice Brennan (*Ibid.*, p. 303) and concurring opinion of Justice Marshall (*Ibid.*, p. 297, fn. 11).

Act. The activities undertaken by the governments of the several States are principally "governmental", not "proprietary". If the State ceased to perform such services [24] it is unlikely that private enterprise would step in to fill the need.

California's noncompetitive nature is best described by the opinion of Justice Mosk, concurring in *Coan* v. *State of California,* 11 Cal.3d 286, 520 P.2d 1003 (1974). Paying an "unyielding respect for the traditional federalism upon which our republic was established", Justice Mosk found that application of the Economic Stabilization Act of 1970 to the sovereign States would transgress the Tenth Amendment. With respect to the claim that the Commerce Clause provided the necessary constitutional support for the Act, Justice Mosk stated (at 1012 of 520 P.2d):

> "If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the

[24] Consider, for example, State activities staffed by prison personnel, highway patrolmen, meat food inspectors, narcotic agents, park rangers, licensing personnel, historian specialists, fire prevention officers, highway equipment mechanics, tax compliance supervisors, water use analysts, airport environmentalists, property appraisers, and regulatory inspectors and examiners, to name a few. The improper application of the Fair Labor Standards Act to patients working in California State Hospitals for the developmentally disabled and mentally ill, and performing work not exclusively of a therapeutic nature, is the subject of a separate action entitled *State of California* v. *Brennan,* United States District Court, E.D. Cal. Civ. No. S74-740. Such hospitals provide *unique* care, are *not* in competition with any private institutions, and therefore perform a *sovereign* function of the State.

State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus, this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency."

This is a similar case in which to assert the autonomous authority of the individual States in the performance of their governmental, nonproprietary activities.

3. In *Wirtz*, this Court's deference to the need for labor peace among private and public workers performing the same or similar work can have no application to State employees performing public services which are without equal in private industry. Moreover, the sensitive parameters of the employer-employee relationship between a State government and its employees is one of local, not national prerogative; thus, for example, no sovereign State grants to its employees the right to strike.

A third rationale advanced by the Government to factually support the 1974 Amendments is the desire to promote and to foster labor peace. Such reasoning

was pivotal to this Court's decision in *Wirtz* (See pp. 191, 194 of 392 U.S.) where there was an apparent need to lessen strife among public and private workers performing the same or similar work. However, the potential interruption in commerce among workers performing the same activities cannot, and should not, serve as a basis for the total abrogation of the State's right to deal with its unique public workers, most of whom have no counterparts in private industry.

There is not a single finding by Congress that labor strife in the public sector has affected national commerce or, if so, whether such strife is correlated to either the lack of a minimum wage or to the uniform administration and payment of overtime compensation. Actually, the converse is true:

> "A rather dramatic picture emerges from the foregoing survey of personnel conditions in the public sector. The number of public employees has been increasing steadily over the past few decades. Labor organizations, both union and quasi-union, have experienced more and more success in their recruitment effort, and appear to have negotiated higher wages for their members than those received by unorganized civil servants performing equivalent chores. In fact, in many cities public employees are paid more than their counterparts in private industry. The consequence of all these factors has been that government payroll expenditures, even after adjustments for price level increases, have skyrocketed during the decade of the sixties." *Unions and Government Employment* (Tax Foundation, Inc., 1972) p. 44.

In March 1970, the distinguished Advisory Commission on Intergovernmental Relations[25] issued its report after a year-long study of employer-employee relations in the public sector. Recognizing the increase in strikes or work stoppages among public sector employees, the Commission recommended that State labor relations laws prohibit all public employees from engaging in strikes, and more importantly, that Congress should not (as here) promulgate Federal impositions into the local employer-employee relationship:[26]

> "The Commission recommends that Congress desist from any further mandating of requirements affecting the working conditions of employees of State and local governments or the authority of such jurisdictions to deal freely or to refrain from dealing with their respected personnel." (Footnote omitted.)

The reasons for the Advisory Commission's recommendations should be obvious. The needs of, resources for, and administration over, State personnel are unique to each of the sovereign States. Thus, for example, while most States (like California) statutorily

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[25] The 26-member Advisory Commission was established by an act of Congress in 1959 to maintain continuing review of relations among federal, state, and local governments. Its membership includes governors, mayors, state legislators, county officials, representatives of Congress, the federal executive branch, and the general public.

[26] *Government Employee Relations Report* (looseleaf), Section 51 (Bur. National Affairs Inc., 1974), page 120.

prohibit "strikes" or "work stoppages" altogether[27], other States (unlike California) have effected forms of collective bargaining. Most importantly, the competitive pressures operating in the private sector are completely absent in the public; the funds necessary to implement a bargained increase is subject completely to the will of the State or local governmental body.[28] For these reasons, federal intervention into the wages and hours of state and local workers will lead to a morass of confusion so well described by the lower court herein (App. 650):

> " . . . there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through com-

[27] Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 Mich. L. Rev. 943, 944 (Mar. 1969); Spero and Capozzola, *Urban Community and its Unionized Bureaucracies* (1973), pp. 254–257; *Pickets at City Hall*, Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment (1970), p. 34.

[28] In California, for example, appropriation of tax revenues necessary to fund the wages and salaries of California State employees is a legislative power (Cal. Const., Art. IV, § 1), and the authority to appropriate said monies resides with the California State Legislature (Cal. Const., Art. III). Neither the State salary-fixing administrative authority (the California State Personnel Board), the executive branch, nor the judiciary, has the power to compel such legislative appropriation of money. *California State Emp. Association* v. *Flournoy*, 32 Cal.App.3d 219, 234–235; 108 Cal. Rptr. 251 (1973); *California State Emp. Association* v. *State of California*, 32 Cal. App. 3d 103, 109; 108 Cal.Rptr. 60 (1973).

> pensatory time off arrangements, rather than time and half overtime pay, and through other local governmental agreements." (Footnote omitted.)

The Court continued to point out that it was "troubled" by the contention of appellants herein concerning the absence of "any factual predicate showing that there has been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales." (App. 651). Respondent has yet to demonstrate the existence of the factual predicate of labor strife upon which it relies.

II. NOTWITHSTANDING SECTION 16(b) (29 U.S.C. § 216(b)) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, THE SOVEREIGN STATES REMAIN IMMUNE FROM SUIT IN THE UNITED STATES COURTS UNDER ARTICLE III AND THE ELEVENTH AMENDMENT

In *Employees of the Department of Public Health and Welfare of Missouri* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279 (1973), this Court addressed itself to a question reserved in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968), namely whether by reason of the 1966 Amendments to the Fair Labor Standards Act, State school and hospital employees could subject their State employers to suit in a Federal forum. It was found that the State continued to enjoy its Eleventh Amendment constitutional immunity from Federal suit by a State citizen, notwithstanding the 1966 Amendments.

The *Employees* case in hand, Congress in 1974 amended section 16(b) of the Fair Labor Standards Act (29 U.S.C. §216(b)) "to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction." (H.R. Rep. No. 913, 93rd Cong. 2d Sess. (1974)). However, as will be seen, the amendment to section 16(b) is still constitutionally infirm under both Article III of the Constitution and the Eleventh Amendment.

Eleventh Amendment Immunity

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In the absence of a State's consent, it can generally be said that the Eleventh Amendment prohibits a State citizen from seeking, or a Federal court from entering, a judgment for monetary relief to be paid from a State's treasury.

In *Edelman* v. *Jordan,* 415 U.S. 651 (1974), this Court articulated in great detail the protection afforded the sovereign States under the Eleventh Amendment as to suits brought by citizens of the same or other States. There, respondent Jordan brought a class action for declaratory and injunctive relief in Federal

court against Illinois officials administering the Federal-State programs of Aid to the Aged, Blind, and Disabled (AABD), which are funded equally by the State and Federal Governments. Jordan contended that the State officials were violating Federal law and denying equal protection of the laws by following State regulations that did not comply with the Federal time limits within which participating states had to process and make grants with respect to AABD applications. The Federal District Court's decision imposed a permanent injunction requiring compliance with the Federal time limits, and also ordered the State officials to release and remit AABD benefits wrongfully withheld to all persons found eligible who had applied therefor between July 1, 1968, the date of the Federal regulations. and April 16, 1971, the date of the Court's preliminary injunction. The Court of Appeals affirmed the lower court's decision, but this Court reversed, holding that the Eleventh Amendment of the Constitution barred that portion of the District Court's decree which had ordered retroactive payment benefits. To the argument that the State of Illinois had "consented" to the bringing of such suit by participating in the Federal AABD program, the Court held (at 673 of 415 U.S.):

> "The Court of Appeals held that as a matter of federal law Illinois had 'constructively consented' to this suit by participating in the federal AABD program and agreeing to administer federal and state funds in compliance with federal law. Con-

structive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171 (1909). We see no reason to retreat from the Court's statement in *Great Northern Insurance Co.* v. *Read*, 322 U. S., at 54 (footnote omitted):

> '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'

"The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."

Justice Marshall, dissenting, found that the State of Illinois had effectively waived its Eleventh Amendment immunity from suit in a Federal forum by agreeing to comply with the conditions imposed by Congress for the receipt of Federal funds. 415 U.S. at 695–696. However, in the instant case, it is unlikely that Justice Marshall would find a surrender of

such sovereignty by the mere continued activity of the State in its sovereign sphere subsequent to promulgation of the Fair Labor Standards Act Amendments of 1974. In fact, the best rebuttal to an alleged "consent" or waiver of immunity in the instant case is set forth by Justice Marshall in his own concurring opinion in the *Employees* case (at 296–297 of 411 U.S.):

> "Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or 'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. Cf. Marchetti v. United States, 390 U. S. 39, 51–52 (1968). In Parden, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case." (Footnote omitted)

As in *Employees,* waiver under the circumstances of this case could only be obviated by the abandonment of crucial public services. Such is "no true choice at all".

Article III Immunity

In the *Employees* case, supra, Justice Marshall in his concurring opinion suggested that the real constitutional impediment to the suit there in issue was *not* the Eleventh Amendment, but Article III of the Constitution, establishing jurisdiction of the Federal courts. See *Hans* v. *Louisiana,* 134 U.S. 1, 12–14 (1890). Said Justice Marshall (at 294 of 411 U.S.):

> "Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this." (Footnote omitted.)

As indicated earlier, Justice Marshall went on to hold that given its Article III immunity, the State of Missouri in the *Employees* case did not (and effectively could not) waive such immunity. An election *not* to waive such immunity would have required the State to literally abandon indispensible public services. The same result obtains here.

There remains the question of whether the broad power of Congress to regulate Commerce under Article I, Section 8, authorizes Congress to demand that the States subject themselves to suit in a Federal forum in the national interest. The answer must surely be

in the negative. The intent of both Article III and the Eleventh Amendment was to guarantee that the States not be made unwilling defendants in Federal court. See *Employees* v. *Missouri, supra,* 411 U.S. at 292, fn. 7 (Marshall, J., concurring). It is submitted that the Eleventh Amendment, the most recent expression of the framers and ratifiers of the Constitution, must prevail over the current, belated attempt by Congress to expose the States to Federal jurisdiction under the Commerce Clause in suits by private individuals. Such jurisdiction is clearly prohibited.

CONCLUSION

For the reasons given, the judgment of the District Court should be reversed with directions to enter permanent injunctive relief against the Fair Labor Standards Act Amendments of 1974 here in issue.

Respectfully submitted,

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March 1975

EXHIBIT A

1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

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An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE; REFERENCES TO ACT

Fair Labor Standards Amendments of 1974.

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;". 29 USC 206.

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

88 STAT. 55

INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES 88 STAT. 56

SEC. 4. Section 6(a)(5) is amended to read as follows:

"(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,

"(B) $1.80 an hour during the year beginning January 1, 1975,

"(C) $2 an hour during the year beginning January 1, 1976,

"(D) $2.20 an hour during the year beginning January 1, 1977, and

"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

80 Stat. 839.
29 USC 206.

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

88 STAT. 56
88 STAT. 57

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

Ante, p. 56

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employees upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher. 88 STAT. 57

88 STAT. 58

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee.

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

Infra.

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

63 Stat. 915; 69 Stat. 711. 29 USC 206.

Ante, p. 55. Ante, p. 56.

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

69 Stat. 712; 72 Stat. 948. 29 USC 210.

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

75 Stat. 70.

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FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060;
80 Stat. 830.
29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.
88 STAT. 58
88 STAT. 59

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65;
86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831;
86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

(B) by striking out "or" at the end of paragraph (3), 80 Stat. 831.
(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or", 29 USC 203.
(D) by adding after paragraph (4) the following new paragraph:
"(5) is an activity of a public agency.", and
(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

(6) Section 3 is amended by adding after subsection (w) the following: "Public agency."
"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.". 52 Stat. 1060; 39 Stat. 832.

(b) Section 4 is amended by adding at the end thereof the following new subsection: 75 Stat. 66. 29 USC 204.
"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.". 29 USC 216.

(c)(1)(A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection: 52 Stat. 1063; 80 Stat. 842. 29 USC 207.
"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,
compensation at a rate not less than one and one-half times the regular rate at which he is employed."

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours". Effective date. Supra.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours". Effective date.

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Effective date.
Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date.
Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies.
29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

52 Stat. 1069; 75 Stat. 74. 29 USC 216.

Statute of limitation, suspension.
61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judg-

Supra.

ment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16". 61 Stat. 89. 29 USC 260.

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce." 52 Stat. 1060; 63 Stat. 910. 29 USC 202.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection: 80 Stat. 841. 29 USC 206.

"(f) Any employee—

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or 64 Stat. 492; 68 Stat. 1078. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)." Ante, p. 55.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection: Ante, p. 60.

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph: 75 Stat. 71; 80 Stat. 838. 29 USC 213.

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph: Ante, p. 61.

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000". Effective date. 80 Stat. 833.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000". Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)". Effective date.

TOBACCO EMPLOYEES

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following: Supra.

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"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal.

(b)(1) Section 13(a)(14) is repealed.

75 Stat. 71; 80 Stat. 838. 29 USC 213.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

Ante, p. 62.

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b)(1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Ante, pp. 55, 60.

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

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(3) Effective two years after such date, section 13(b)(23) is repealed. Repeal; effective date. Ante, p. 63.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 75 Stat. 71. 29 USC 213.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed. Repeal; effective date.

NURSING HOME EMPLOYEES

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph. 80 Stat. 833.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises". 80 Stat. 842. 29 USC 207.

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following: Supra.

"(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours". Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours". Effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)". Repeal; effective date.

(e) The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an 80 Stat. 830. 29 USC 203.

88 STAT. 65

amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 63.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph:

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

EMPLOYEES OF CONGLOMERATES

SEC. 18. Section 13 is amended by adding at the end thereof the following:

52 Stat. 1067; 71 Stat. 514, 29 USC 213.

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).".

Ante, p. 55.

Ante, p. 59.

SEASONAL INDUSTRY EMPLOYEES

SEC. 19. (a) Section 7(c) and 7(d) are each amended—

80 Stat. 835. 29 USC 207.

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended— Effective date.

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed. Repeal; effective date.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

SEC. 20. (a) Section 13(b)(15) is amended to read as follows: 80 Stat. 835.

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

(b)(1) Section 13(b) is amended by adding after paragraph (24) the following new paragraph: Ante, p. 65.

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(25) is amended—

Ante, p. 66. (A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(F) forty-four hours in any other workweek in that year,".

(3) Effective January 1, 1976, section 13(b)(26) is amended— Effective date. Ante, p. 67.

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(i) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 80 Stat. 836. 29 USC 213.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(3) Effective two years after such date, such section is repealed. Repeal; effective date.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.".

Ante, p. 68.

OTHER EXEMPTIONS

Repeal. 80 Stat. 836. 29 USC 213.

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

Ante, p. 67.

"(27) any employee employed by an establishment which is a motion picture theater; or".

Repeal. 75 Stat. 71; 80 Stat. 838.

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

Ante, p. 55.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

Ante, p. 56.

80 Stat. 839.
29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839.
29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations.

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection: Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws." Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)." 52 Stat. 1062; 69 Stat. 711. 29 USC 204. Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection: 52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows: 80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee— Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5), 80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older.".

(c) Section 16 is amended by adding at the end thereof the following new subsection: 52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness Penalty.

of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

"(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

52 Stat. 1068. 29 USC 215.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9a)."

80 Stat. 384.

48 Stat. 582; 53 Stat. 581.

SUITS BY SECRETARY FOR BACK WAGES

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

63 Stat. 919; 80 Stat. 844. 29 USC 216.

Ante, pp. 55, 68.

ECONOMIC EFFECTS STUDIES

SEC. 27. Section 4(d) is amended by—

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

"(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

Ante, p. 72.

Ante, p. 72.

Ante, p. 66.

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employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976. Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.". Reports to Congress. Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty". 81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.". "Employee."

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000". 29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section: 29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in 29 USC 633a.

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80 Stat. 378.

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).
SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).
CONGRESSIONAL RECORD, Vol 120 (1974):
Feb. 28, Mar. 5, 7, considered and passed Senate.
Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.
Mar. 28, Senate and House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:
Apr. 8, Presidential statement.

EXHIBIT B

Title 29—Labor

CHAPTER V—WAGE AND HOUR DIVISION

PART 553—EMPLOYEES OF PUBLIC AGENCIES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

The Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 et seq.), as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 55), extends the Act's minimum wage, overtime, equal pay and recordkeeping requirements to most public agency employees. In the case of certain public agencies (i.e., those having employees engaged in fire protection and law enforcement activities, including security personnel in correctional institutions), application of the Act's overtime provisions was delayed until January 1, 1975. This delay was accomplished by new section 13(b)(20) which provided an interim overtime exemption for all such employees regardless of the size of the employing public agency. Effective January 1, 1975, however, the section 13(b)(20) exemption will, by its express terms, be limited to fire protection and law enforcement employees who are employed by a public agency which has, during the workweek, less than five employees so engaged. For larger public agencies having such employees, the Act provides, in section 7(k), a partial overtime exemption which, by its express terms, becomes effective January 1, 1975. These two sections are self-executing and do not depend upon administrative rules or regulations.

On May 17, 1974, however, the Acting Administrator of the Wage and Hour Division, United States Department of Labor, recognizing the need for the issuance of guidelines for interpreting the new and unique overtime exemptions relating to these public agency employees, published in the FEDERAL REGISTER (39 FR 17596) notice of a hearing scheduled for June 3, 1974, to obtain evidence and receive comments regarding the duties, customs, practices, and working conditions of such employees.

The public hearing which was held as scheduled on June 3, 1974, lasted two full days, during which time 11 individuals and organizations testified and 143 related exhibits were made a part of the hearing record.

Thereafter, on October 30, 1974, the Administrator of the Wage and Hour Division, after reviewing the hearing record in light of the express language and legislative history of the sections 7(k) and 13(b)(20) exemptions, issued proposed regulations (29 CFR Part 553), defining "employees engaged in fire protection and law enforcement activities" and prescribing tentative guidelines for determining hours worked, the work period and tour of duty, and caused the proposed regulations to be published in the FEDERAL REGISTER (39 FR 38063).

The proposed regulations as thus published invited interested persons to submit written comments, suggestions, data or arguments in regard to them on or before December 2, 1974, and, in addition, scheduled a further public hearing for November 18, 1974. In order to give as wide publicity as possible to all affected public agencies, copies of the proposed regulations were mailed directly to the governors of all 50 States, with informational copies going to every State Attorney General and State Fire Marshal, each of whom was requested to bring the proposed regulations to the attention of interested State and local government officials. In addition, approximately 800 copies of the proposed regulations were mailed to individuals, labor organizations, employer organizations, State and local government officials and agencies, as well as to members of the United States Congress.

The further public hearing, announced in the FEDERAL REGISTER on November 1, 1974, was held in Washington, D.C., on November 18-21, 1974, for the purpose of receiving oral suggestions, proposals and comments on the proposed Part 553 from interested persons. Thirty-eight individuals and organizations testified at this second hearing and approximately 300 related exhibits were made a part of the hearing record, which, along with the June 1974 hearing record, is on file with the Chief, Branch of Wage-Hour Standards, Wage and Hour Division, United States Department of Labor, Room 1107, 711 14th Street, NW., Washington, D.C. 20210.

A thorough analysis of all testimony and written material received in connection with the November 1974 hearing has been made, again in conjunction with the express statutory language and pertinent legislative history. This analysis indicated the desirability of making certain changes and additions in 29 CFR Part 553, as proposed, as well as adding new sections to it for the purpose of calling attention to the existence of other Fair Labor Standards Act exemptions which might be available to public agencies affected by new Part 553, as well as to the Act's recordkeeping requirements which are applicable to all covered employers. Other changes in proposed Part 553 expand the term "any employee in fire protection activities" to include employees of forestry conservation agencies who spot forest or brush fires and help in their extinguishment along with other individuals who are called upon to assist during periods of emergencies and high fire danger. Similarly, the term "any employee in law enforcement activities" has been expanded to include "border patrol agents," and modified to indicate that fish and game wardens and criminal investigative agents assigned to such offices as those of a district attorney may be engaged in such activities, depending upon the particular facts. Both of the foregoing terms have been further expanded to indicate that bona fide fire protection and law enforcement employees will not lose their exempt status when they perform "support activities" on a rotational assignment for training or familiarization purposes, or for other reasons due to illness, injury or infirmity; the requirement that law enforcement officers be sworn has been deleted, as has the requirement for completed training. The sections dealing with training (§ 553.7), secondary and joint employment (§ 553.9), volunteers (§ 553.11) and "comp time" (formerly § 553.17 and now § 553.19) have been further clarified, and a new section has been added to explain the general rules for determining compensable hours of work. Numerous other minor changes have been made but they are not discussed in this preamble since they can be readily discerned by comparing the proposed Part 553 with the version now to be issued. It was suggested that changes be made in the current definitions of executive, administrative or professional employees, and these suggestions, although not germane to the section 7(k) or 13(b)(20) exemptions, will be considered when 29 CFR Part 541 is reissued. The arguments criticizing the subsections dealing with mutual aid agreements (§ 553.10) and sleep and meal time (§ 553.15) were carefully considered. No substantive changes were made, however, because these subsections restate legal requirements which cannot be waived or altered by any official of the Department of Labor. Numerous other arguments were directed to the inflationary or cost impact of Part 553. Whatever impact there is, however, is the result of the 1974 Amendments, which, after Congress had considered these same arguments, expressly extended overtime protection to employees engaged in fire protection and law enforcement activities. Moreover, the extent to which the Act will have a cost impact on such public agencies depends, in large part, upon which of the several alternatives open to them the State and local jurisdictions elect to use. Assuming that all jurisdictions elect section 7(k), without any modification in the present tours of duty, the estimated cost impact of the extension of the Act's overtime requirement for calendar year 1975 is estimated to be $27 million for all such jurisdictions.

In issuing Part 553, it is recognized that the Secretary of Labor has been directed by the 1974 Amendments to conduct a study in calendar year 1976 of the hours ordinarily worked by fire protection and law enforcement employees, and to publish the results thereof in the FEDERAL REGISTER (88 Stat. 61). Now, therefore, pending completion of such study or studies, the final version of Part 553 is hereby adopted on an interim basis to read as follows:

Sec.
553.1 Statutory provisions.
553.2 Purpose and scope.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

Sec.
553.3 Fire protection activities.
553.4 Law enforcement activities.
553.5 20-percent limitation on nonexempt work.
553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Sec.
553.7 Employees attending training facilities.
553.8 Ambulance and rescue service employees.
553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.
553.10 Mutual aid.
553.11 Fire protection and law enforcement volunteers.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

553.12 General statement.
553.13 Tour of duty.
553.14 General rules for determining compensable hours of work.
553.15 Sleeping and meal time as compensable hours of work.
553.16 Work period.
553.17 Early relief.
553.18 Trading time.
553.19 Time off for excess hours or so-called "comp time."
553.20 The "regular rate."
553.21 Records to be kept.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 88 Stat. 60; (29 U.S.C. 201-219).

§ 553.1 Statutory provisions.

(a) In extending coverage to certain public agency employees, the Fair Labor Standards Act (hereafter the Act), by virtue of section 13(b)(20), provided a complete overtime exemption for any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) during the period between the effective date of the 1974 Amendments (May 1, 1974) to and through December 31, 1974. Beginning January 1, 1975, however, this complete overtime exemption may be claimed only with respect to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities, as the case may be."

(b) Beginning January 1, 1975, public agencies not qualifying for the complete overtime exemption provided in section 13(b)(20) will be required to pay overtime compensation to their fire protection and law enforcement employees on a workweek basis as required by section 7(a) of the Act unless they elect to take advantage of the partial overtime exemption provided in section 7(k) which applies, not on a workweek basis, but on a work period basis, as follows:

> • • • No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> (1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
>
> (2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate of not less than one and one-half times the regular rate at which he is employed.
>
> (B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".
>
> (C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".
>
> (D) Effective January 1, 1978, such section is amended—
>
> (i) By striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and
>
> (ii) By striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days • • •.

(c) These statutory provisions, as is apparent from their terms, are limited to public agencies and do not apply to any private organization engaged in furnishing fire protection or law enforcement services, and this is so even if the services are provided under contract with a public agency.

(d) In determining whether a public agency qualifies for the section 13(b)(20) exemption after January 1, 1975, the fire protection and law enforcement activ-

ities are considered separately. Thus, for example, if a public agency employs less than five employees in fire protection activities but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, and both must be counted in determining whether the exemption applies. Bona fide volunteers may be excluded. This determination of the number of employees engaged in each of the two named activities is made on a workweek basis.

(e) In addition to the special exemptions provided in sections 7(k) and 13(b)(20), which are the subject matter of Parts 553, the Act provides other exemptions which, depending upon the facts, may be claimed for certain employees in lieu of such special exemptions. For example, section 13(a)(1) provides a complete exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, and that exemption may be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities and salary. Thus, although police captains are clearly employees engaged in law enforcement activities, they may also, depending upon the facts, qualify for the section 13(a)(1) exemption, in which event the employing agency may claim that exemption for such employees in lieu of the section 7(k) or 13(b)(20) exemption. Similarly, certain criminal investigative agents may qualify as administrative employees, in which event the employing agency may elect which of the applicable exemptions it will claim for such employees. In no event, however will the election to take the section 13(a)(1) exemption for an employee who qualifies for it result in excluding that employee from the count that must be made under § 553.1(d) in determining whether the employer may claim for its other employees the section 13(b)(20) exemption.

§ 553.2 Purpose and scope.

The purpose of Part 553 is to define the pertinent statutory terms used in sections 7(k) and 13(b)(20) and to set forth the rules by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption.

Employees Engaged in Fire Protection and Law Enforcement Activities (Including Security Personnel in Correctional Institutions)

§ 553.3 Fire protection activities.

(a) As used in section 7(k) and 13(b)(20) of the Act, the term "any employee in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district and who, pursuant to the extent required by State statute or local ordinance, has been trained and has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type and (2) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent" employee, or of their particular speciality or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (d) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.7.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire

breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as biologists and office personnel who do not fight fires on a regular basis, except, of course, during those emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section. Additionally, for those persons who actually engage in these fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

§ 553.4 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics. Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.8.

(b) Typically, employees engaged in law enforcement activities include city police; district or local police; sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(c) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdition. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C). Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law en-

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forcement activities for purposes of claiming the section 13(b)(20) exemption.

(d) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities," as that term is used in sections 7(k) and 13(b)(20). Such employees would typically include (1) building inspectors (other than those defined in § 553.3(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employes who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20-percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b)(20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3(a), 553.4(a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or §§ 553.4(a) and (e), and if such nonqualifying activities, standing alone or in conjunction with

some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforce-

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ment employee works for another public or private employer who, although entirely separate from the employee's regular employer, is nonetheless a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mutual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the

agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift, as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.11 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and indispensable to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior

approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work period (days):	*Maximum hours standard*
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accordingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's

hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section 6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

Signed at Washington, D.C. this 18th day of December 1974.

BETTY SOUTHARD MURPHY,
Administrator.

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